**********CR LOT 0208A**C005
MERRIAM JOHN
4005 20TH AVE W STE 110
SEATTLE WA 98199-1290

Washington State Association for Justice
1809-7th Ave., Suite 1500
Seattle, WA 98101-1328
(206) 464-1011
wsaj@washingtonjustice.org
www.washingtonjustice.org

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Is employment of fishermen 'at will' or is just cause required for discharge?

by John Merriam

Fishermen are notorious liars -- from the size and quantity of fish caught to what was promised in payment for catching those fish. That's part of the reason Congress passed 46 U.S.C. 10601 in 1988. Written employment contracts are now required on fishing boats of 20 gross tons or more for fishermen, whether working for a lay (share of the catch) or a fixed wage. Required in those contracts is the "period of effectiveness" for the employment. This article asserts that fishermen may not be fired during the "period of effectiveness" without 'cause' -- a good reason. In other words, the employment-at-will doctrine does not apply to fishermen during the contractual term. Incredibly, more than 25 years after passage of 46 U.S.C. 10601, there are still no reported cases on this issue: Does the statute abrogate employment-at-will for fishermen during the "period of effectiveness" in their contracts of employment?

Employment at will means at the employer's 'will', that "an employer may terminate the employment of an employee at will, with or without cause . . . " Davis, Maritime Law Deskbook at p. 501 (2010). Because there are no cases construing 46 U.S.C. 10601 on this particular point, the author looked to state law for guidance. The lead case is Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984). Thompson involved a situation of indefinite employment and no written contract. "Generally, an employment contract, indefinite as to duration, is terminable at will by either the employee or the employer." Id. (emphasis added) The state Supreme Court ruled that an employment contract "is terminable only for cause if there is an implied agreement to that effect . . . " What about a contract that is 'definite in duration' -- for a specified term? It is here suggested that during the "period of effectiveness" of a fisherman's contract, there is an implied agreement that 'cause' is required to terminate the employment. The Thompson case reiterated the general rule that employment is at will for "employment for an indefinite period". Therefore, it can only be assumed that employment for a definite period is not 'at will' and that just cause is required for discharge during the contractual term of employment. A contractual period of effectiveness "may create an atmosphere where employees JUSTIFIABLY RELY on the expressed policy . . . (in an employee handbook, and the employer thus) creates an atmosphere of job security . . ." Id., 102 Wn.2d at 230 (emphasis in original). See also, Gagliardi v. Denny's Restaurants, 117 Wn. 2d 426 (1991).

Justifiable reliance on a guarantee of employment for the "period of effectiveness" is perhaps a bigger factor for fishermen waiting for particular fishing seasons than it is for landlubbers worried about job security. In some fisheries it is common for deckhands to perform uncompensated pre-season work, such as net repair and vessel fit-out, in reliance upon an agreed crewshare for the entirety of an upcoming

season -- the "period of effectiveness" for the employment contract. Maritime Law Deskbook at p. 502. Should a vessel owner be allowed to fire those deckhands without just cause before they have earned a share of the catch for the duration of the season they relied on while working pre-season for no pay? Equity screams that the answer is 'no', and that's how section 10601 must be construed.

Take for example an experienced deckhand waiting for the lucrative summer salmon season in Southeast Alaska. He's offered a job aboard a salmon seiner and signs an employment contract lasting to the end of salmon season -- about two months -- at a crewshare of 10% of the catch, after deductions for food, fuel, and bait. Before the season starts he's required to work for free for two weeks to get the boat ready for the upcoming season. He sleeps aboard and gets chow, but is paid no wages. The boat heads to the fishing grounds. 10 days into the season the vessel owner fires the deckhand because the owner's brother-in-law wants the job. If employment is at will during the "period of effectiveness" -- the salmon season -- the deckhand has no recourse and the vessel owner was perfectly within his rights. Is this fair? Again the answer must be a resounding 'no'. Some in the fishing industry, when presented with the example above, have stated that the deckhand's remedy is quantum meruit compensation -- usually expressed as an hourly wage -- for the previously uncompensated pre-season labor. That's fine for the vessel fit-out and work on the nets, but it's too late for the deckhand to sign on another seiner and he's missed the salmon season. He had justifiably relied, to his detriment, on the "period of effectiveness" in his employment contract and passed up other jobs. He has also lost a good portion of his income for the entire year.

What about situations where employment contracts, otherwise in compliance with 46 U.S.C. 10601, state that employment is still at will? That language remains in most contracts presented to fishermen. It is the author's contention that 'employment at will' recitations in such contracts are contradictory and are of no force and effect during the "period of effectiveness" for the employment. The requirement of a contractual term would be meaningless if employers could ignore it and fire employees for no reason during the "period of effectiveness" simply by putting 'employment at will' in the contract. At least one federal judge in the Western District of Wash. disagrees with this analysis.

This practitioner filed two separate lawsuits against the same employer for wrongful discharge from the same boat, on behalf of the Master and a deckhand, respectively. Both cases were filed in federal court lest in rem relief -- a vessel arrest -- became necessary. The employer was a fishing company unknown to the undersigned, with a rustbucket of a boat and whose solvency was uncertain. Both the Master and the deckhand had signed 100-day contracts on a fishing tender (a boat that picks up fish from catcher boats and delivers it to factory ships or shoreside canneries) for a fixed daily wage. Both had been fired for no stated reason part way into the 100-day period. The employment contracts for both stated that employment was at will.

The Master's lawsuit was the first to be filed and was assigned a judge. In the deckhand's lawsuit, filed shortly thereafter, it was noted on the Civil Cover Sheet for federal court that a "Related Case" -- the Master's -- had been assigned that judge. For reasons not understood by the author, the deckhand's case was assigned to a different federal judge.

In response to an initial demand letter alleging wrongful discharge, the lawyer for the fishing company cited to the employment at will language in the employment contracts, stating that the Master and the deckhand had no cause of action. After lawsuits were filed, defense counsel started scrambling for 'just cause', even while maintaining that cause was not necessary because the employment was 'at will'. The fishing company then claimed the Master was incompetent, and that the deckhand had bad hygiene and stunk from not showering. (The Master claimed that he refused to continue a voyage from Seward to Bristol Bay, Alaska because the boat was taking on water faster than it could be pumped out. The deckhand claimed that he didn't 'stink', and took showers ashore in Seward because the showers aboard the boat weren't working. He also said that he had complained about safety problems to company representatives.)

Shortly after the lawsuits were filed, defense counsel filed motions to dismiss both cases for failure to state a claim, or in the alternative, for a more definite statement of the claim. Defense counsel asserted that cause was not required in an employment at will situation,

and therefore discharge without cause could not be 'wrongful'. The judge assigned to the deckhand rejected that argument, holding that the deckhand "alleges the existence of a for-cause employment contract, and a breach thereof."

Ruling to the contrary, the judge assigned to the Master dismissed his case with leave to amend the Complaint. That judge held that the Master had failed to state a claim, pursuant to FRCP 12(b)(6), because: "Plaintiff never asserts that he substantially performed his job duties or was able to fulfill his duties under the contract." This practitioner thought that 'substantial job performance' was assumed by an allegation of discharge without cause -- as recognized by the deckhand's judge -- but dutifully amended the Complaint nevertheless, adding the requisite language. The Master's case was then reopened.

Defendants filed Answers in both cases, including the affirmative defense of employment at will. Plaintiffs in both cases then filed motions to strike employment-at-will as an affirmative defense pursuant to FRCP 12(f). Recognizing the lack of precedent on the issue, plaintiffs argued: "The ("period of effectiveness") language of sec. 10601 is so clear that no reported cases have been needed to interpret it . . . " The battle was joined, or so this practitioner thought.

Before either judge had ruled on the motion, the judge assigned to the deckhand belatedly recognized that the deckhand's case was related to the Master's case and directed the federal clerk to reassign the deckhand's case to the other judge.

The Master's judge, who now had both cases, denied both motions, ruling: "Because a durational term in a contract is not necessarily inconsistent with an at-will relationship, striking Defendant's affirmative defense is not warranted." Taking the plaintiffs' argument that there were no reported cases on point and turning it on its head, the judge ruled in twin orders that, "Plaintiff cites no authority indicating a durational term in a contract precludes an at-will relationship."

Plaintiffs in both cases -- the Master and the deckhand -- appealed to the U.S. Court of Appeals for the Ninth Circuit under the statute allowing interlocutory appeals in admiralty cases, 28 U.S.C. 1292(a)(3). This practitioner argued for interlocutory review because there was no way to prevail on a wrongful discharge claim if employment under section 10601 was at will. In each appeal it was stated: "If the Ninth Circuit affirms the trial court's ruling on the employment at will doctrine, plaintiff will take a voluntary dismissal of this case."

After plaintiffs filed interlocutory appeals, defendants moved the trial judge to amend the Answers to drop the affirmative defense of employment at will. Plaintiffs opposed the motion as untimely and a blatant attempt to pull the rug out from under the just-filed appeals – an attempt to prevent the Ninth Circuit from ruling on employment at will during the "period of effectiveness" for fishermen's contracts. "Why," the plaintiffs asked rhetorically, "did defendants oppose plaintiffs' earlier motion to strike the affirmative defense of employment at will if they intended to withdraw that defense anyway? Why did the defendants wait until after the appellate court filing fee (i$455 for each case) was paid, and two or more motions in the Ninth Circuit were filed, before withdrawing this affirmative defense?" Plaintiffs argued that if the trial court sua sponte ruled that employment at will was the law -- whether or not pled affirmatively by defendants -- it could find that plaintiffs hadn't proved wrongful discharge because defendants didn't need just cause for discharge. The trial judge granted defendants' motion to withdraw employment at will as an affirmative defense.

Meanwhile, the deckhand disappeared and stopped communicating with the undersigned. He was fined $500 for failing to timely respond to discovery. After that his case was dismissed with prejudice for failure to prosecute and he was fined another $500. He got a final kick in the pants on his way out the door when the court entered judgment against him for the fines, totaling $1,000 plus interest.

The Master's case proceeded apace, with a flurry of motions in both the trial court and the Ninth Circuit. Plaintiff filed a motion to stay proceedings in the trial court pending appellate review in the Ninth Circuit. "If employment at will remains a viable defense during the 'period of effectiveness' of 46 U.S.C. 10601, plaintiff cannot prove his case." The Master argued that further proceedings in the trial court were futile and pointless. The trial judge denied the motion.

Defendants filed a motion asking the Ninth Circuit to dismiss the appeal for lack of jurisdiction, claiming that "the district (trial) court has made no final determination affecting the rights and liabilities of the parties with regard to the issue of at will employment." Plaintiff resisted the motion, arguing that liability had already been finally determined when the trial

judge ruled that employment at will was still a valid defense despite the language of 10601.

Defendants filed another motion asking the Ninth Circuit to take judicial notice that the trial court had granted defendants' motion to withdraw employment at will as an affirmative defense, and had denied plaintiff's motion to stay proceedings in the trial court pending appellate review. The Ninth Circuit never ruled on that motion, granting instead defendants motion to dismiss the appeal as premature. The appellate court held that interlocutory appeals in admiralty cases are allowed "only when the order appealed from determines the rights and liabilities of the parties." The appeal was dismissed.

This practitioner has been around long enough to know which way the wind was blowing. Taking the case to trial would be a waste of time. The trial judge could make a gratuitous finding of fact that the Master's discharge was for cause, all-the-while holding that no cause was required because his employment was 'at will'. That would leave nothing to appeal. The case promptly settled for 50 cents on the dollar for wages claimed by the Master.

The deckhand's case is McAllister v. E&E Foods et al., No. C12-1541 (W.D. Wash.) The Master's case is Rector v. E&E Foods et al., No. C12-1527 (W.D. Wash.). Plaintiffs in both cases were represented by John Merriam. Defendants in both cases were represented by Nancy Harriss of Holmes Weddle & Barcott.

None of the orders discussed above have been reported in legal publications. This remains an open issue with no authority on point. There's more to come, so stay tuned . . .

John Merriam is a former merchant seaman, now a sole practitioner at Seattle's Fishermen's Terminal, who limits his practice to the representation of maritime claimants for wages and injury.